80-949

Supreme Court, U.S.
FILED
DEC 10 1980
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

October Term, 1980

No. _____

MICHAEL MOTORS, INC.,

Petitioner

vs.

COLORADO DEALER LICENSING BOARD, STATE OF COLORADO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

DAVID W. PEHR
3380 West 72nd Avenue
Westminster, Colorado 80030
Telephone Number:
Area Code 303-427-1516

Attorney for Petitioner
Michael Motors, Inc.

In the
Supreme Court of the United States

October Term, 1980

No. _____

MICHAEL MOTORS, INC.,

Petitioner

vs.

COLORADO DEALER LICENSING BOARD, STATE OF COLORADO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

The Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of

Colorado entered on September 23, 1980, with Petition for Rehearing being denied on September 29, 1980.

QUESTION PRESENTED FOR REVIEW

Whether the State of Colorado denied Petitioner its right of access to the civil courts of that state, contrary to the due process and equal protection provisions of the Fourteenth Amendment of the United States Constitution, by suspending Petitioner's automobile dealer's license, solely because Petitioner challenged the validity of a contract.

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the Supreme Court of the State of Colorado. Petitioner here, Michael Motors, Inc., was Plaintiff-Appellant in the State Supreme Court. Respondent here, Colorado Dealer Licensing Board, State of Colorado, was Defendant-Appellee in the State Court proceedings.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW 2

LIST OF PARTIES 2

TABLE OF AUTHORITIES 4

CITATIONS TO OPINION BELOW 5

STATEMENT OF JURISDICTION 5

CONSTITUTIONAL AND STATUTORY PROVISIONS 5

STATEMENT OF THE CASE 6

ARGUMENT 9

CONCLUSION 14

APPENDIX

A. Opinion of the Supreme Court of the State of Colorado 15

B. Denial of Petition for Rehearing 21

C. Decision of The District Court, State of Colorado, City and County of Denver 22

D. Order of The Colorado Dealer Licensing Board, State of Colorado 24

E. Colorado Revised Statutes, 1973, Section 12-6-118 26

F. Complaint, District Court, County of Adams, State of Colorado 28

G. Excerpts from Petitioner's Preliminary Statement, Colorado Court of Appeals 32

H. United States Constitution,
Fourteenth Amendment, Section 1 36

TABLE OF AUTHORITIES

Page

CASES:

Barbier v. Connolly,
113 US 27 (1885) 9, 10, 12, 13, 14

Silver v. Cormier,
529 F. 2d 161 (10th Cir., 1976) 10, 12, 13, 14,

Truax v. Corrigan,
257 US 312 (1921) 10, 12, 13, 14

CONSTITUTIONAL PROVISIONS:

United States Constitution,
Fourteenth Amendment, Section 1 6
(Full text, Appendix) 36

STATUTES

28 USC 1257 (3) 5, 9

CRS, 1973, 12-6-118 5

CRS, 1973, 12-6-118 (3) (f) 5, 7, 8

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of the State of Colorado is reported at 616 P. 2d 110 (1980), and is set out in the Appendix, infra, at page 15. Denial of Petition for Rehearing from the Supreme Court of the State of Colorado is set forth in the Appendix, infra, at page 21. The decision of the District Court of the State of Colorado, City and County of Denver, is unreported, but is set out in the Appendix, infra, at page 22. The order of the Colorado Dealer Licensing Board, State of Colorado, is unreported, but is set out in the Appendix, infra, at page 24.

JURISDICTION

Judgment of the Supreme Court of the State of Colorado was issued on September 2, 1980, and Petition for Rehearing to said Court was denied September 29, 1980. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Colorado statute involved is section 12-6-118 (3) (f), which reads as follows:

> (3) A motor vehicle dealer's, wholesaler's, or used motor vehicle dealer's license may be denied, suspended, or revoked on the following grounds:
>
> . . .
>
> (f) Intentional failure to perform any written agreement with any retail buyer; . . .

The full text of Section 12-6-118 is reproduced in the Appendix, at Page 26, infra.

The provision of the United States Constitution involved is United States Constitution, Fourteenth Amendment, the full text of which is found in the Appendix, at page 36.

STATEMENT OF THE CASE

Petitioner is an automobile dealer licensed under the Automobile Dealer's Act, sections 12-6-101 through 112-6-124, Colorado Revised Statutes, 1973. Under the terms of the above statute the Colorado Dealer Licensing Board is empowered to receive complaints concerning the business conduct of licensed automobile dealers, to conduct hearings regarding such complaints, and to impose penalties and sanctions upon offending motor vehicle dealers. These penalties and sanctions may include suspension or revocation of dealer's licenses.

The series of events which has led Petitioner here arose out of dealings between B. H. Denholm, a salesman for Michael Motors, and Alfred Maldonado, a retail customer, in regard to a certain truck. On the date in question, this truck was parked on a separate lot used for the storage of recently purchased vehicles, awaiting preparation for sale. According to Petitioner's standard business procedure, no vehicle could be prepared or offered for sale except at the direction of Mr. Duane Michael, President of Michael Motors, Inc. Nevertheless, without either the permission or knowledge of Mr. Michael, the subject pickup truck was moved from the storage lot to the sales lot, but no sales price was fixed for the vehicle, pending an inspection of the pickup truck and the completion of all necessary repairs. On the date in question, Mr. Denholm, without authorization, engaged in negotiations with Mr. Maldonado and eventually offered the truck to Mr. Maldonado for $750.00, a price substantially below the fair market value for said vehicle.

Mr. Denholm then prepared the Buyer's Order and Invoice. He was aware that all agreements reached by salesmen had to be approved by Duane Michael as President of Michael Motors. The Buyer's Order and Invoice clearly states, in bold face type, that "THIS ORDER MUST BE SIGNED BY AN OFFICIAL OF THE COMPANY". Mr. Denholm was not the Manager of Michael Motors, nor did he serve as an official of the Company. Nevertheless, Mr. Denholm signed his name in the blank reserved for the Manager's approval. At no time did Mr. Michael approve or authorize the sale in question. Upon seeing the contract, Mr. Michael rejected the same in the good faith belief that he had a right to do so, since he had never approved or authorized the transaction, and the salesman who had done so knew he was acting wrongfully and misleading the buyer as to his authority.

Thereafter purchaser made complaint to the Colorado Dealer Licensing Board and proceedings were commenced upon such complaint. Following a hearing, the Board, on March 26, 1979, ordered that Petitioner's license be suspended for a period of seventeen days for violation of the terms of section 12-6-118 (3) (f) of Colorado Revised Statutes, 1973.

Petitioner then filed its complaint in the District Court in and for the County of Adams, State of Colorado, seeking review of the Board's decision. Please see Appendix, page 28, infra, for Plaintiff's complaint. In its complaint Petitioner alleged, among other things, that "the action of defendants, as it relates to the suspension of Plaintiff's Motor Vehicle Dealer's License . . ., was contrary to Plaintiff's constitutional rights, powers, privileges and immunities; . . .". On motion by the Board venue was transferred to the District Court in and for the City and County of Denver, State of Colorado, which Court upheld the order of the Dealer Licensing

Board. Petitioner then appealed to the Colorado Court of Appeals. Pursuant to the Colorado accelerated docket procedure, Petitioner filed its Preliminary Statement containing the proposed issues on appeal, set forth in general terms. There the Petitioner listed, as an issue: "Whether the trial Court erred in finding CRS, 1973, 12-6-118 (3) (f) to be constitutional on its face". (See Petitioner's Preliminary Statement in the Appendix, at page 32, infra.) Since the constitutionality of the State statute was thereby placed in issue, the matter was then transferred to the Supreme Court of the State of Colorado.

On September 2, 1980, the Supreme Court of the State of Colorado affirmed the decision of the District Court of the City and County of Denver. In so doing, the Court stated:

> This brings us to the appellant's constitutional challenges to the Automobile Dealers Act. . . . The first challenge focuses upon appellant's assumption that the written agreement must be a valid and enforceable contract before the Board can impose a sanction. On this premise, it is asserted that the appellant is deprived of its opportunity to litigate the contractual nature of the agreement in a court of law, thereby violating its right to due process and equal protection. . . .
>
> The appellant's position is untenable because the assumption is not supported by the language of section 12-6-118(3) (f). Had the legislature contemplated that the statute apply only to valid and enforceable contracts, it would have so stated. However, it chose to authorize sanctions for the refusal to honor "*any written agreement* with any retail buyer." (Emphasis added.) The enforceability of an agreement need

not be found by the Board before it may impose a sanction for violation of the statute. (See Appendix, page 15).

Petitioner then filed a Petition for Rehearing before the Supreme Court of the State of Colorado which was denied on September 29, 1980. Petitioner now requests this Honorable Court to issue a writ of certiorari under jurisdiction granted by 28 U.S.C. 1257 (3).

ARGUMENT

Petitioner contends that the above cited decision of the Supreme Court of the State of Colorado, found in the Appendix hereto at page 15, is in conflict with the prior decisions of this Honorable Court, and, further, is in conflict with prior decisions of the United States Court of Appeals for the Tenth Circuit. Petitioner further contends that the subject decision unconstitutionally denies Petitioner its right of access to the courts for redress of civil grievances, as protected by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

This Court has consistently held that the right of access to the courts of the land is a fundamental right protected by the due process and equal protection guarantees of the Fourteenth Amendment to the United States Constitution. In *Barbier v. Connolly*, 113 U.S. 27 (1885), Mr. Justice Field states:

> The 14th Amendment, in declaring that no State "Shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of

> property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights: that all persons should be equally entitled to pursue their happiness and acquire and enjoy property: *that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts:* . . . (Emphasis supplied).

Again, in *Truax v. Corrigan,* 257 U.S. 312 (1921), this Court, citing *Barbier,* supra, held that an Arizona statute restricting the issuance of restraining orders and injunctions in cases involving disputes between employers and employees, unconstitutionally restricted the employers' access to the courts, contrary to the due process and equal protection guarantees of the Fourteenth Amendment to the United States Constitution. In so doing this Court stated:

> Here is a direct invasion of the ordinary business and property rights of a person, unlawful when committed by anyone, . . . except when committed by ex-employees of the injured person. If this is not a denial of the equal protection of the laws, then it is hard to conceive what would be. To hold it not to be, would be, to use the expression of Mr. Justice Brewer (citations omitted) to make the guarantee of the equality clause "a rope of sand."

The concept that access to the courts of the land is a right protected by the Fourteenth Amendment to the United States Constitution has also been recognized in the Tenth Circuit. In *Silver v. Cormier,* 529 F. 2d 161 (Tenth Cir. 1976), the United States Court of Appeals for

the Tenth Circuit, had before it a case in which an official of the Denver Urban Renewal Authority threatened to withhold from plaintiff $10,000.00, to which plaintiff was entitled by law as a relocation cost, if plaintiff commenced action to recover certain additional funds from DURA. In holding such an act unlawful, the United States Court of Appeals for the Tenth Circuit stated:

> Access to the courts of the United States is a constitutional right guaranteed by the due process clauses of the fifth and fourteenth amendments. *Harbolt v. Alldredge,* 10 Cir., 464 F.2d 1243, 1244, *cert. denied,* 409 U.S. 1025, 98 S.Ct. 473, 34 L.Ed.2d 319; *Evans v. Moseley,* 10 Cir., 455 F.2d 1084, 1087. This right of access to the courts cannot be infringed upon or burdened.

It is this Petitioner's contention that the decision of the Supreme Court of the State of Colorado in the case at bar is directly in conflict with the above cited decisions.

Petitioner contends that the Colorado Court's decision in the above encaptioned action not only burdens Petitioner's right of access to the Courts, but, as a practical matter, *utterly denies* such access to that class of persons known as "motor vehicle dealers". Situations will certainly arise in which a motor vehicle dealer has valid defenses to a written agreement. It is, for example, not unlikely, that after a price has been agreed upon by dealer and customer, a simple error in transposition of figures when the agreement is reduced to writing, may lower that price by thousands of dollars. Again, it is not inconceivable that a dishonest salesman may conspire with a friend or relative to sell an automobile for less than the price authorized by the dealer. Petitioner submits that in such cases, fundamental fairness requires that the dealer be allowed to raise the defenses of mistake or fraud at some point in the proceeding. When the effect of

this Court's decision is analyzed, it becomes abundantly clear that, as a practical matter, the used motor vehicle dealer dare not litigate his rights under an agreement, nor assert valid defenses to the same. He has no practical choice but to perform the terms of an agreement, even under circumstances where he clearly has valid defenses to the same, since even if he prevails, he loses his license.

Petitioner further contends that the Constitutional defects in the above cited statute, as construed by the Supreme Court of Colorado, cannot be alleviated merely by requiring that sanctions be imposed only for violation of a *valid* agreement. Such a construction does not remove the statutory burden placed upon the dealer wishing to exercise his right of access to the courts in order to litigate the validity of a written agreement. The dealer remains on the horns of a dilemma. He can on the one hand choose to perform an agreement in which he believes he is being victimized, and to which he believes he has valid defenses. On the other hand, he can choose to litigate the issue of the validity of the contract, knowing that if, for any reason, he does not prevail, he risks the loss of his license, his business and his livelihood. Certainly, there is no doubt of the chilling effect this threat has upon a dealer. No sensible dealer could choose the latter course. In effect then, the dealer is coerced into foregoing his right to litigate the matter and effectively prevented from presenting his defenses to the agreement at any stage of the proceedings, contrary to the principles announced in *Barbier*, *Truax*, and *Silver*, supra.

The State Court's decision is no less in conflict with the above cited decisions of this Court and those of the Tenth Circuit on equal protection grounds. Clearly, what the State Court's decision accomplishes is no less than the establishment of a certain class of persons to whom the right of access to the Court for the purpose of deter-

mining contractual rights is denied. The subject statute, as interpreted by the Colorado Supreme Court, effectively prevents any member of that class of persons known as "motor vehicle dealers" from making the slightest attempt, either before a court of law or an administrative body, to present in good faith those defenses which they may have to a purported agreement. Conversely, no such limitation is placed upon those persons with whom the dealer must transact business, the retail purchaser. While the dealer is forbidden by the State Court's interpretation of the subject statute to assert any rights which he may have under the law to avoid the agreement, the retail purchaser may freely choose to attack the validity of the agreement in any suit brought by the dealer to enforce the terms thereof. Petitioner is not aware of any other class of persons who, under Colorado law, are compelled to forego their right to attack the validity of a purported contract and forced to perform even those agreements which are invalid and unenforceable, simply because of the trade or business in which they happen to be engaged. Clearly, such a selective and yet total denial of meaningful opportunity to present the defenses which one may have to a purported contract, does not comport with the Fourteenth Amendment guarantees of equal protection and is utterly in conflict with basic principles announced by this Court and the Tenth Circuit Court of Appeals in *Barbier*, *Truax* and *Silver*, supra. If the mere threat to withhold government funds which are properly due and owing is unconstitutionally burdensome upon the exercise of a citizen's right of free access to the civil courts, how much more constitutionally repugnant must be the State's threat, in the instant case, to deprive an entire class of persons of their business and livelihood, should they dare to object when the property rights which they hold in their inventory are confiscated under the auspices of an invalid document?

CONCLUSION

As the above cited decisions in *Barbier* and *Truax*, supra, demonstrate, this Court has always considered the right of access to the civil courts of the land to be one of the most fundamental of rights guaranteed by the Fourteenth Amendment to the United States Constitution. As set forth above, when the practical effect of the Colorado Supreme Court's decision in the case at bar is analyzed, it is amply clear that said Court's decision is directly in conflict with the principles announced by this Court in *Truax* and *Barbier*, and further, is directly in conflict with the Tenth Circuit's prior decisions on the matter, including *Silver*, supra. Petitioner urges this Court to grant its foregoing Petition for Writ of Certiorari in order to resolve the existing conflict between the ruling of the Colorado Supreme Court in the instant case, and the prior decisions of this Court and of the Tenth Circuit Court of Appeals. Further, Petitioner contends that this Court should grant Petitioner's Petition and review the Colorado Court's action in view of the critical and fundamental nature of the right of access to the civil courts, which the State of Colorado has denied to Petitioner without either valid or compelling reason.

Upon the premises hereinabove set forth, Petitioner respectfully prays that this Honorable Court grant the within Writ of Certiorari to the Supreme Court of the State of Colorado.

Respectfully submitted,
LAW OFFICES OF WILLIAM PEHR

By _____

David W. Pehr
Attorney for Petitioner
3380 West 72nd Avenue
Westminster, Colorado 80030
303-427-1516

APPENDIX A

IN THE SUPREME COURT OF COLORADO

NO. 80SA22

MICHAEL MOTORS, INC.,

Plaintiff-Appellant,

v.

COLORADO DEALER LICENSING BOARD, STATE OF COLORADO,

Defendant-Appellee.

SEP 2 1980

Appeal from the District Court
of the
City and County of Denver

Hon. Zita L. Weinshienk, Judge

EN BANC JUDGMENT AFFIRMED

David Pehr,
William Pehr,
Westminster, Colorado

Attorney for Plaintiff-Appellant.

J. D. MacFarlane, Attorney General,
Richard F. Hennessey, Deputy Attorney General,
Mary J. Mullarkey, Solicitor General,
Billy Shuman, Special Assistant Attorney General,
Denver, Colorado

Attorneys for Defendant-Appellee.

CHIEF JUSTICE HODGES delivered the Opinion of the Court.
JUSTICE LEE does not participate.

The appellant automobile dealer seeks reversal of the trial court's affirmance of the Colorado Dealer Licensing Board's (Board) order suspending its license for 17 days. Several constitutional challenges are raised with regard to the Automobile Dealers Act, sections 12-6-101 to 12-6-126, C.R.S. 1973. Appellant also asserts that the Board's findings, conclusion and order are improper and not supported by the evidence. We reject these challenges and affirm the judgment of the trial court.

The suspension of the appellant's license was based upon the "intentional failure to perform any written agreement with any retail buyer." Section 12-6-118(3) (f), C.R.S. 1973. The record reveals that in late 1978, a prospective buyer came to the premises of appellant, Michael Motors, Inc., pursuant to a sales advertisement. He was greeted by a Mr. Denholm, a salesman, who was alone on the premises, except for several mechanics. Mr. Denholm informed the prospective buyer that the advertised vehicle had been sold, and then proceeded to show him other vehicles for sale. The buyer became interested in a pickup truck and inquired as to the price. Mr. Denholm informed him that the asking price was $1,095. The two men began to negotiate, and finally Mr. Denholm lowered the purchase price to $750.

The buyer then agreed to purchase the truck at this price, and the two men signed a written agreement for the sale of this vehicle. The buyer gave Mr. Denholm a $95.75 deposit and since it was a Saturday, he agreed to return the following week after obtaining the balance of the purchase price from his bank account. The agreement included a line for the buyer's signature and a line for the "MANAGER'S SIGNATURE." Mr. Denholm signed the

agreement in the latter location. Below the "MANAGER'S SIGNATURE" line it stated "THIS ORDER MUST BE SIGNED BY AN OFFICIAL OF THE COMPANY."

There is a dispute whether Mr. Denholm did or did not inform the buyer that the agreement was subject to approval of a person other than himself. As to this, the Board found that Mr. Denholm acted as "manager and agent" of the appellant, thereby creating a "written agreement" with a retail buyer. Since there is substantial evidence in the record to support this finding, it will not be rejected on appeal.

The buyer returned to the appellant's place of business the following week to consummate the sale. Although he understood that he had a written agreement, he was informed by the president that the deal would not be completed unless the purchase price was increased. The buyer was informed that the caveat on the agreement required approval of the president of Michael Motors, Inc.; that there was no "manager"; and that only the president approved all agreements. The evidence presented revealed that on the day of this particular agreement, the president was out of town.

The buyer complained to the licensing authority, and the proceedings before the Board were commenced. Following a hearing, it was determined that the plaintiff's license should be suspended for 17 days as a result of its refusal to honor the agreement. The appellant then commenced an action in the trial court challenging the suspension. The district court affirmed the Board's order.

The appellant makes two contentions regarding the action of the Board. First, he argues that the evidence does not support the findings of the Board. We disagree.

A complete review of the record indicates that there was substantial evidence on the record as a whole to support the findings of the Board. Although Mr. Denholm may not have had actual authority to bind the appellant to the written agreement in this case, under the facts and circumstances as shown in this record, the doctrine of apparent authority is clearly applicable. *See Bowser v. Union Bag Co., Inc.*, 112 Colo. 373, 149 P.2d 800 (1944); *White v. Brock*, 41 Colo. App. 156, 584 P.2d 1224 (1978); *Russell v. First American Mortgage Co.*, 39 Colo. App. 360, 565 P.2d 972 (1977); *Zambruk v. Perlmutter 3rd Generation Builders, Inc.*, 32 Colo. App. 276, 510 P.2d 472 (1973).

Second, the appellant argues that the requisite intent under section 12-6-118(3) (f) was not demonstrated because the president refused to honor the written agreement under the assumption that it was not a valid contract. One of the grounds for suspension of a motor vehicle dealer's license under this statutory provision is "intentional failure to perform any written agreement with any retail buyer." Appellant claims that the intent under the statute is a specific intent which is negated by his assumption that the agreement was not an enforceable contract. We note that the question regarding the contractual nature of the agreement is a question of law, and it is axiomatic that a mistake of law is no defense to the culpability of a person's actions. *See Kirkendoll v. People*, 138 Colo. 267, 331 P.2d 809 (1958). It is therefore clear that even if the president was mistaken as to the enforcement of the written agreement, the Board correctly determined that the appellant, acting through its president, intentionally failed to perform the agreement.

This brings us to the appellant's constitutional challenges to the Automobile Dealers Act. (Sections 12-6-101 to 123, C.R.S. 1973). The challenges can be

categorized into two basic areas. The first challenge focuses upon appellant's assumption that the written agreement must be a valid and enforceable contract before the Board can impose a sanction. On this premise, it is asserted that the appellant is deprived of its opportunity to litigate the contractual nature of the agreement in a court of law, thereby violating its right to due process and equal protection. Also, the appellant claims that an issue of law is therefore being resolved by an agency of the executive branch of government in violation of the separation of powers doctrine.

The appellant's position is untenable because the assumption is not supported by the language of section 12-6-118(3)(f). Had the legislature contemplated that the statute apply only to valid and enforceable contracts, it would have so stated. However, it chose to authorize sanctions for the refusal to honor "*any written agreement* with any retail buyer." (Emphasis added.) The enforceability of an agreement need not be found by the Board before it may impose a sanction for violation of the statute.

Appellant's next constitutional challenge relates to the vagueness and overbreadth of section 12-6-118(3)(f). First, we find the application of the statute with regard to the refusal to honor any written agreement with a retail buyer is not overbroad. Such a prohibition clearly fits within the justifiable legislative intent of the Automobile Dealers Act to induce "trust and confidence of the purchaser" in retail transactions, and it does not create a chilling effect upon any constitutionally protected right of an automobile dealer. Nor is the statute unconstitutionally vague. The burden to overcome the presumption of constitutionality in cases such as this is great. *See Beathune v. Colorado Dealer Licensing Board*, _____ Colo. _____ , 601 P.2d 1386 (1979). The appellant has failed to overcome this presumption. We find that this

subsection is sufficiently clear to place automobile dealers on notice as to what is prohibited and to allow the uniform enforcement of this provision by the Board.

Judgment affirmed.

JUSTICE LEE does not participate.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF COLORADO

MICHAEL MOTORS, INC., Plaintiff-Appellant,	)	Appeal from the District Court of the City & County of Denver
80SA22 vs.	)	
COLORADO DEALER LICENSING BOARD, STATE OF COLORADO, Defendant-Appellee.	)	

Upon consideration of the Petition for Rehearing filed by the attorney for Plaintiff-Appellant in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition shall be, and the same hereby is, Denied.

BY THE COURT, EN BANC, SEPTEMBER 29, 1980.

cc: William Pehr, Esq.
David Pehr, Esq.
3380 West 72nd Avenue
Westminster, Colorado 80030

J. D. MacFarlane, A.G.
Richard F. Hennessey, Deputy A.G.
Mary J. Mullarkey, Sol. Gen.
Billy Shuman, Asst. A.G.
1525 Sherman Street, 3rd Fl.
Denver, Colorado 80203

APPENDIX C

AND AFTERWARDS, and on to-wit, the 20th day of September, 1979, the same being one of the regular judicial days of the January, 1979 Term of Court, the following proceedings, inter alia, were had and entered of record in said Court, to-wit:

+++

JUDGE ZITA L. WEINSHIENK

MICHAEL MOTORS, INC.	)	
	)	
vs.	)	79CV4541
	)	
COLORADO DEALER LICENSING BOARD, ET AL	)	

ORDER:
TRIAL TO COURT AND REVIEW
ARGUED TO CONCLUSION
JUDGMENT ENTER FOR DISMISSAL
AND COSTS
PLAINTIFF HAS 14 DAYS TO FILE
NOTICE OF APPEAL
STAY OF EXECUTION PENDING APPEAL

At this day come the parties hereto, by their attorneys, respectively.

Whereupon, this cause comes on to be heard and reviewed on decision of the Colorado Dealer Licensing Board.

Whereupon, comes the arguments of counsel to the conclusion, and the Court now being sufficiently advised in the premises;

IT IS ORDERED BY THE COURT that Judgment enter in favor of the defendant and against the Plaintiff for dismissal and costs.

And thereupon, IT IS FURTHER ORDERED BY THE COURT that Plaintiff has FOURTEEN (14) days to file Notice of Appeal; Stay of Execution pending appeal.

+++

APPENDIX D

STATE OF COLORADO
COLORADO DEALER LICENSING BOARD

IN THE MATTER OF MICHAEL MOTORS, INC. Dealer License No. 2312 Respondent	FINDINGS, CONCLUSION AND ORDER

THIS MATTER having come on for a public hearing before the Colorado Dealer Licensing Board on March 14, 1979, pursuant to due Notice of Hearing issued by the Board to licensee on February 20, 1979; and the Board having considered the evidence presented; and the Board being fully advised in the premises, hereby FINDS AND CONCLUDES:

1. That licensee did, itself or by and through its agents and/or employees, on or about October 7, 1978, intentionally fail to perform a written agreement entered into in its behalf by its manager and agent, B. H. Denholm, with Alfred Maldonado, in which Maldonado contracted with Michael Motors, Inc. to purchase a 1968 Ford F250 pickup from Michael Motors, Inc. for the total amount of $795.75, in violation of C.R.S. 1973, 12-6-118(3)(f).

Now therefore, it is hereby ORDERED by the Colorado Dealer Licensing Board in consideration of the foregoing and pursuant to authority of law that:

1. licensee's place of business shall be closed and licensee shall not conduct business as a motor vehicle dealer from April 2, 1979, through April 18, 1979.

2. licensee shall post a clear and conspicuous sign on his place of business stating "Closed by Order of the Colorado Dealer Licensing Board for violations of the license law and regulations." Sign shall be posted April 2, 1979, through April 18, 1979.

3. licensee shall take and pass the written dealer examination during the suspension period.

4. licensee shall, in writing to the Board, outline his intentions to handle consumer complaints and comply with the Dealer Licensing Law and Regulations.

5. licensee shall be placed on one (1) year probation from the date of this notice.

6. After the findings, the Board in determining an appropriate penalty, considered the fact that the present violation occurred while licensee was under a one year probation imposed by the Board on July 10, 1978 as a result of other violations of the Dealer Licensing Law.

ORDERED and filed at Denver, Colorado this 22nd day of March, 1979.

COLORADO DEALER LICENSING BOARD
STATE OF COLORADO

APPENDIX E

Colorado Revised Statutes, 1973, Section 12-6-118(3)

12-6-118. (3) A motor vehicle dealer's, wholesaler's, or used motor vehicle dealer's license may be denied, suspended, or revoked on the following grounds:

(a) Proof of unfitness;

(b) Material misstatement in an application for a license;

(c) Violation of any of the terms and provisions of this part 1 or any rule or regulation promulgated by the board under this part 1;

(d) Having been convicted of a felony involving moral turpitude while being licensed under this part 1, but in considering the conviction of a crime, the board shall be governed by the provisions of section 24-5-101, C.R.S. 1973;

(e) Defrauding any retail buyer, motor vehicle salesman, or financial institution to such person's damage.

(f) Intentional failure to perform any written agreement with any retail buyer;

(g) Failure or refusal to furnish and keep in force any bond required under this part 1;

(h) Having made a fraudulent sale, transaction, or repossession;

(i) Fraudulent misrepresentation, circumvention, or concealment, through whatsoever subterfuge or device, of any of the material particulars or the nature thereof required to be stated or furnished to the retail buyer;

(j) Repealed, L. 77, p. 611, § 1, effective June 1, 1977.

(k) To intentionally publish or circulate any advertising which is misleading or inaccurate in any material particular or which misrepresents any of the products sold or furnished by a licensed dealer;

(l) To knowingly purchase, sell, or otherwise acquire or dispose of a stolen motor vehicle;

(m) For any licensed motor vehicle dealer or used motor vehicle dealer to engage in the business for which such dealer is licensed without at all times maintaining a principal place of business as required by this part 1 during reasonable business hours;

(n) Engaging in such business through employment of an unlicensed motor vehicle salesman;

(o) To willfully violate any law of the state respecting commerce and motor vehicles or any lawful rule of regulation respecting commerce and motor vehicles promulgated by any licensing or regulating authority pertaining to motor vehicles;

(p) Failure to pass the licensing test required by this part 1;

(q) Engaging in such business without having adequate service facilities for the reconditioning and servicing of motor vehicles or having a valid and existing contract with a duly licensed and reputable garage with such facilities;

(r) Representing or selling as a new and unused motor vehicle any motor vehicle which the dealer or salesman knows has been used and operated for demonstration purposes or which the dealer or salesman knows is otherwise a used motor vehicle;

(s) Violating any state or federal statute or regulation issued thereunder dealing with odometers.

APPENDIX F

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF ADAMS AND
STATE OF COLORADO

Civil Action No. _____

MICHAEL MOTORS, INC., a Colorado corporation Plaintiff vs COLORADO DEALER LICENSING BOARD, STATE OF COLORADO; and LARRY G. DYSLIN, as Executive Secretary of the Colorado Dealer Licensing Board; DEPARTMENT OF REVENUE, STATE OF COLORADO; and ALAN CHARNES, as Director of the Department of Revenue, Defendants	COMPLAINT

COMES NOW the above named Plaintiff, by and through its attorney, William Pehr, and for a cause of action against Defendants states as follows:

1. That the Plaintiff's principal place of business is located at 6401 Federal Boulevard, County of Adams, State of Colorado.

2. That each Defendant is a body politic, organized and existing pursuant to the Constitution of the State of Colorado and the statutes thereof.

3. That Larry G. Dyslin is the Executive Secretary of the Colorado Dealer Licensing Board, and Alan Charnes is the Director of the Department of Revenue, State of Colorado.

4. That on March 14, 1979, pursuant to Notice of Hearing issued by the Colorado Dealer Licensing Board to Plaintiff, a public hearing was had requiring Plaintiff to answer certain charges made against it and to show cause why its Used Motor Vehicle Dealer's License should not be suspended or revoked.

5. That on March 22, 1979, the Defendant Colorado Dealer Licensing Board, by and through its Executive Secretary Larry G. Dyslin, issued its Order suspending Plaintiff's license to conduct business as a motor vehicle dealer from April 2, 1979, through April 18, 1979, as well as issuing other related Orders.

6. That on March 22, 1979, the action of the Defendants, as it relates to the suspension of Plaintiff's motor vehicle dealer's license number 2312 and other matters, was arbitrary, capricious, and an abuse of discretion, a clearly unwarranted exercise of discretion, was contrary to Plaintiff's Constitutional rights, powers, privileges and immunities; was not in accord with the procedures or procedural limitations of the Colorado Administrative Procedures Act and the other statutes of the State of Colorado; was unsupported by substantial evidence; and unsupported by the record when considered as a whole.

7. That Plaintiff will sustain irreparable injury as a result of the revocation of his motor vehicle dealer's

license number 2312, as a result of the suspension of said license, unless an Order staying the effective date of the Order of Suspension is entered without bond or other security.

WHEREFORE, Plaintiff asserts that it has been adversely affected by the actions of Defendants as set forth above, and seeks the following relief:

1. That the District Court direct the Clerk of the District Court to issue a Citation commanding Defendants to certify and return to this Court at a specific time all documents, records, evidence and transcripts relating to the proceedings before Defendants on March 22, 1979.

2. That the District Court direct the Clerk of the District Court to issue a Citation directing the Defendants to show cause why the relief requested by the Plaintiff in this complaint should not be granted.

3. That the District Court review the record and decision of the Defendants and other relevant evidence as permitted by law relating thereto without limitation, and reverse the Order of Suspension dated March 22, 1979, and direct that Defendants reinstate and not suspend the Plaintiff's Motor Vehicle Dealer License No. 2312.

4. That this District Court issue an Order staying the effective date of the Order of Suspension and all other action of the Defendants against Plaintiff as it relates to the subject matter of this lawsuit, until a final determination of the within cause of action can be made.

5. That this District Court issue all further necessary and appropriate process in order that the rights of the Plaintiff be preserved, pending the conclusion of the

judicial review proceedings, and for such other, further and different relief as the Court deems proper.

LAW OFFICES OF WILLIAM PEHR

By

William Pehr — 2423
Attorney for Plaintiff
3380 West 72nd Avenue
Westminster, Colorado 80030
427-1516

Plaintiff's Address:
6401 Federal Blvd.
Denver, Colorado 80221

APPENDIX G

COLORADO COURT OF APPEALS
No. 79CA0899

MICHAEL MOTORS, INC.,	)	
	)	
Plaintiff-Appellants,	)	
	)	
v.	)	79CV4541
	)	
COLORADO DEALER LICENSING BOARD, STATE OF COLORADO	)	
	)	
Defendant-Appellee.	)	

APPELLANT'S PRELIMINARY STATEMENT

TRIAL COURT HISTORY:

COURT: District — TRIAL COURT NO.

COUNTY: Denver — JUDGE: Zita Weinshienk

DATE OF JUDGMENT: September 20, 1979 — DATE NOTICE OF APPEAL FILED: September 27, 1979

NAME OF COUNSEL:

Attorney for Appellant:

William Pehr
Law Offices of
William Pehr
3380 West 72nd Avenue
Westminster, Colo. 80030
427-1516

Attorney for Appellee:

Billy Shuman
Special Assistant Attorney General
General Legal Services Section
State Services Building

Registration No.: 2423

1525 Sherman Street,
3rd Floor
Denver, Colorado 80203
839-3611
Registration No.: 4878

DISPOSITION IN TRIAL COURT:

Judgment entered upholding the order of the Colorado Dealer Licensing Board dated March 22, 1979, suspending Dealer License No. 2312 of Michael Motors, Inc. Relief requested reversal of the Order of Suspension and order to the Colorado Dealer Licensing Board to reinstate the dealer license of Michael Motors, Inc.

NATURE OF CASE:

This action arises from the dealings between a saleman for Michael Motors, Inc. and Alfred Maldonado on October 7, 1978, in regard to a 1968 Ford pick-up. Mr. Maldonado claimed that the salesman executed a valid Buyer's Order and Invoice with the authority of Michael Motors, Inc. and conveyed to him a pick-up truck for $750.00. Michael Motors, Inc. asserted that the salesman did not have authority to sell the vehicle; that the salesman so notified Mr. Maldonado and quoted Mr. Maldonado a sales price of $750.00 contingent upon the approval of Duane Michael, president of Michael Motors, Inc. Michael Motors, Inc. refused to approve the sale for the price of $750.00 and transfer the vehicle whereupon Mr. Maldonado complained to the Colorado Dealer Licensing Board. The Board, by its Findings, Conclusions and Order of March 22, 1979, found Michael Motors, Inc. in violation of C.R.S., 1973, § 12-6-118(3)(f): "intentional failure to perform any written agreement with any retail buyer . . ."

Michael Motors, Inc. brought this action requesting judicial review of the Board's order pursuant to C.R.S., 1973, § 12-6-119 and in accordance with C.R.S., 1973 § 24-4-106, as amended.

ISSUES PROPOSED TO BE RAISED ON APPEAL:

1. Whether the trial court applied the proper standard of review of the Findings, Conclusions and Order of the Colorado Dealer Licensing Board pursuant to C.R.S. 1973, as amended, § 24-4-106(7).

2. Whether the trial court erred in finding C.R.S., 1973, § 12-6-118(3)(f) to be constitutional on its face.

3. Whether the trial court erred in finding that a valid agreement existed between Michael Motors, Inc. and Alfred Maldonado.

4. Whether the trial court erred in finding that Michael Motors, Inc. "intentionally" violated C.R.S. 1973, § 12-6-118(3)(f).

5. Whether the trial court erred in finding that the Findings, Conclusions and Order of the Colorado Dealer Licensing Board in the Matter of Michael Motors, Inc., Dealer License No. 2312 was supported by substantial evidence.

6. Whether the trial court erred in finding that the Findings, Conclusions and Order of the Colorado Dealer Licensing Board in the Matter of Michael Motors, Inc., Dealer License No. 2312 was not arbitrary or capricious.

RECORD ON APPEAL

Items 1, 3, 6 and 7 listed in the abbreviated record are necessary to resolve the issues raised in this appeal.

STATEMENT OF POSITION RE: TRANSCRIPT:

No evidence was presented before the court hence the transcript of evidence is unnecessary to resolve the issues raised on appeal.

Dated this 11th day of October, 1979.

LAW OFFICES OF WILLIAM PEHR

By _____

William Pehr 2423
Attorney for Plaintiff-Appellant
3380 West 72nd Avenue
Westminster, Colorado 80030
427-1516

I hereby certify that I have this date mailed a true copy of the foregoing Preliminary Statement of Appellant to the attorney for Defendant-Appellee, Billy Shuman at 1525 Sherman Street, 3rd Floor, Denver, Colorado 80203, postage prepaid.

Dated this 12th day of October, 1979

/s/ L. Woods

APPENDIX H

United States Constitution, Fourteenth Amendment, Section 1.

ARTICLE XIV

§ 1. Citizenship defined - privileges of citizens. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

No. 80-949

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

MICHAEL MOTORS, INC.,

Petitioner,

vs.

COLORADO DEALER LICENSING BOARD, STATE OF COLORADO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J.D. MacFARLANE
Attorney General

RICHARD F. HENNESSEY
Deputy Attorney General

MARY J. MULLARKEY
Solicitor General

BILLY SHUMAN
Special Assistant Attorney General
General Legal Services Section

Attorneys for Respondent

1525 Sherman Street, 3d Floor
Denver, Colorado 80203
Telephone: (303) 866-3611

QUESTION PRESENTED FOR REVIEW

Under the facts of this case was petitioner denied access to the civil courts of the State of Colorado, contrary to the fourteenth amendment of the United States Constitution, justifying federal judiciary intervention in the decision of the Supreme Court of the State of Colorado?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW 1

TABLE OF AUTHORITIES 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 7

STATEMENT OF THE CASE 7

SUMMARY OF THE ARGUMENT 11

ARGUMENT

I. IT IS NOT NECESSARY FOR THE COURT TO DECIDE THE CONSTITUTIONAL ISSUE AS PETITIONER, AS PRINCIPAL, IS LIABLE ON THE AGREEMENT MADE IN ITS BEHALF BY ITS AGENT WHO, IF NOT HAVING ACTUAL AUTHORITY, HAD APPARENT AUTHORITY. 12

II. PETITIONER HAS NOT BEEN DENIED ACCESS TO THE COURTS CONTRARY TO THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT. 15

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Page

Atlantic Coast Line v. Riverside Mills, 219 U.S. 186, 55 L. Ed. 167, 31 S. Ct. 164 (1911) 16

Barbier v. Connolly, 113 U.S. 27, 28 L. Ed. 923, 5 S. Ct. 357 (1885) 17, 18

PREVIOUS PAGE WAS BLANK

Page

Barnes v. Treece, 15 Wash. App. 437, 549 P.2d 1152 (1976) 13

Beathune v. Colorado Dealer Licensing Board, ____ Colo. ____, 601 P.2d 1386 (1979) 17

Bowser v. Union Co., 112 Colo. 373, 149 P.2d 800 (1944) 12

Carey v. Greyhound Lines Inc., 380 F. Supp. 467 (D.C. La. 1973), modified on other grounds 500 F.2d 1372 (5th Cir. 1974) 14

Chicago Burlington & Quincy R.R. Co. v. McGuire, 219 U.S. 549, 55 L. Ed. 328, 31 S. Ct. 259 (1911) 16

Clark v. American Marine Corp., 304 F. Supp. 603 (D.C. La. 1969) 14

Ford Motor Co. v. Pace, 206 Tenn. 559, 335 S.W.2d 360, appeal dismissed, 364 U.S. 444, 939 (1960) 17

Galemore Motor Co. Inc. v. State Farm Auto Ins. Co., 513 S.W.2d 161 (Mo. App. 1974) 13

Hayes v. Missouri, 120 U.S. 68, 30 L. Ed. 578, 7 S. Ct. 350 (1887) 18

Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161 (7th Cir. 1974) 14

Johnson v. Hurley, 115 Mo. 513, 22 S.W. 492 (1893) 13

Jones v. C.I.T. Co., 64 Utah 151, 228 P. 896 (1924) 13

Kober v. Westinghouse Electric Corp., 480 F.2d 240 (10th Cir. 1973) 14

McGowan v. King, Inc., 569 F.2d 845 (5th Cir. 1978) 14

Missouri Pacific Railway Co. v. Humes, 115 U.S. 512, 29 L. Ed. 463, 6 S. Ct. 110 (1885) 18

Meek v. Smith, 59 Colo. 461, 149 P. 627 (1915) 13, 14

Mugler v. Kansas, 123 U.S. 623, 31 L. Ed. 205, 8 S. Ct. 273 (1887) 16

Page

Nebbia v. New York, 291 U.S. 502, 78 L. Ed. 940, 54 S. Ct. 505 (1934) 16

Nelsen v. Tilley, 137 Neb. 327, 289 N.W. 388 (1939) 17

New Motor Vehicle Board of Cal. v. Orrin W. Fox Co., 439 U.S. 96, 58 L. Ed. 361, 99 S. Ct. 403 (1978) 16

Portland Motor Sales Co. v. Millett, 124 Me. 329, 128 A. 694 (1925) 13

Powell v. Pennsylvania, 127 U.S. 678, 32 L. Ed. 256, 8 S. Ct. 995 (1888) 17

Russell v. First American Mortgage Co., 39 Colo. App. 360, 565 P.2d 972 (1977) 13

Semke v. State of Oklahoma Motor Vehicle Comm., 465 P.2d 441 (1970) 17

Silver v. Cormier, 529 F.2d 161 (10th Cir. 1976) 15

Soon Hing v. Crowley, 113 U.S. 703, 28 L. Ed. 1145, 5 S. Ct. 730 (1865) 18

State v. Marshall, 15 Ohio App. 2d 187, 239 N.E.2d 755 (1968) 14

Trail Ridge Ford v. Dealer Board, 190 Colo. 82, 543 P.2d 1245 (1975) 17

Trail v. Ind. Com'n., Div. of Employment and Security, 540 S.W.2d 179 (Mo. App. 1976) 13

Truax v. Corrigan, 257 U.S. 312, 66 L. Ed. 254, 42 S. Ct. 124 (1921) 18

White v. Brock, 41 Colo. App. 156, 584 P.2d 1224 (1978) 12

Wynn v. McMahon Ford Co., 414 S.W.2d 330 (Mo. App. 1967) 13

Zambruk v. Perlmutter, 32 Colo. App. 276, 510 P.2d 472 (1973), ... 12

STATUTES

Page

C.R.S. 1973:
12-6-104(3)(e) 7
12-6-118(3)(f) 8,10,13,14
24-4-106(4) 10
24-4-106(8) 7,11,15
15 U.S.C.A. 1601 14

OTHER AUTHORITY

Page

Restatement (Second) of Agency section 161 12
2C.J. 574 section 214 12
2C.J. 592 section 229 12

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions set forth by petitioner, the following Colorado statutes are involved:

a. C.R.S. 1973, 12-6-104(3)(e) which reads:

(3) The board is authorized and empowered:

. . . .

(e) After due notice and hearing, to revoke and suspend, on such terms and conditions and for such period of time as to the board shall appear fair and just, any motor vehicle dealer's, wholesaler's, motor vehicle salesman's, or used motor vehicle dealer's license. . . .

b. C.R.S. 1973, 24-4-106(8) which reads as follows:

(8) Upon a showing of irreparable injury, any court of competent jurisdiction may enjoin at any time the conduct of any agency proceeding in which the proceeding itself or the action proposed to be taken therein is clearly beyond the constitutional or statutory jurisdiction or authority of the agency. If the court finds that any proceeding contesting the jurisdiction or authority of the agency is frivolous or brought for the purpose of delay, it shall assess against the plaintiff in such proceeding costs and a reasonable sum for attorneys' fees (or an equivalent sum in lieu thereof) incurred by other parties, including the state.

STATEMENT OF THE CASE

Pursuant to C.R.S. 1973, 12-6-104(3)(e), the Colorado Dealer Licensing Board, herein referred to as board or respondent, ordered petitioner, Michael Motors, Inc., a licensed used motor vehicle dealer, to appear before the

board to answer an allegation that, on or about October 7, 1978, petitioner did, itself or by and through its agents and/or employees, intentionally fail to perform a written agreement entered into in its behalf by its manager and agent, B.H. Denholm, with one Alfred Maldonado, in which Maldonado contracted with petitioner to purchase a 1968 Ford F250 pickup for the amount of $795.75, in violation of C.R.S. 1973, 12-6-118(3)(f).

The record for judicial review before the district court and the Supreme Court of Colorado consisted solely of evidence as reported in the transcript of the March 14, 1979 proceeding and exhibits to that hearing. Reference to the record of the hearing will refer to the page as (R. ____).

At the administrative hearing, Maldonado stated that he visited petitioner's car lot with his wife on October 7, 1978, because of a newspaper advertisement offering a car for sale. At that time no one was on the lot, except perhaps for mechanics working at the rear of the lot, other than Barney Denholm. Denholm advised Maldonado that the vehicle advertised had been sold but showed Maldonado a 1968 Ford pickup (R. 4-6). After negotiation, Denholm offered to sell the vehicle to Maldonado for $750 and the latter agreed to buy the vehicle for that price (R. 7). A document, titled "Buyers Order and Invoice" signed by Maldonado, as buyer, and B.H. Denholm, as manager of Michael Motors, Inc., in which Maldonado agreed to purchase the 1968 Ford pickup, for a total amount of $795.75, was admitted (Resp. Ex. 1; R. 7). There was no trade-in involved and Maldonado gave Denholm a down payment of $95.75 (R. 7). This was a Saturday and, as Maldonado lacked sufficient cash to pay in full, he informed Denholm that he would return the first day his bank was open with the balance owed and then take the vehicle. The following Tuesday Maldonado returned to the lot to pay and receive the vehicle. At that time, Denholm and Mr. Duane Michael were present. The latter informed Maldonado that he could not sell the vehicle for the price Denholm had agreed to sell and Mr. Michael asked Maldonado to pay an additional $150. Mr. Michael

agreed to return the deposit if Maldonado did not want the truck at the new price and told Maldonado that exhibit 1, the buyer's order, was not a valid contract as it was not signed by a company official (R. 8, 9). Maldonado then registered a complaint with the board (R. 10).

Maldonado testified that he thought when he and Denholm signed the buyer's order on October 7, 1978, he had purchased the vehicle and Denholm led him to believe that he had (R. 18, 19, 21). Maldonado also stated that when he visited the lot Mr. Denholm identified himself as Barney. Maldonado did not know that Denholm was not an official of Michael Motors Inc. until told by Mr. Michael the following Tuesday (R. 20, 21). Exhibits from an earlier hearing before the board involving Michael Motors, Inc. revealed that on prior occasions Mr. Denholm had also signed buyer's orders as manager (Resp. Exs. 2, 3; R. 25). Mr. Duane Michael testified that he was president of petitioner corporation and that he, his father and ex-wife were the only officers and stockholders. He stated that he purchased the 1968 truck from Sill Ter-Har Ford in a package deal on October 6, 1978, and that Sill Ter-Har listed the value of the truck at $750. The truck was not prepared for sale and it was physically placed on property behind petitioner's car lot but was not marked "Not for Sale." Mr. Michael further stated that for the past ten years he had no managers and that he approved all sales, some eighty sales per month. If absent, he called the lot and approved or disapproved such sales by phone. Denholm had not been authorized to sell the truck. On October 7, a sales contest was in progress and Denholm, in his opinion, sold the truck to finish high in the contest. Mr. Michael said that he was not present on October 7 and was not aware of the sale until the following Monday. He then found out about the sale and told Denholm to contact the purchaser and inform him that Michael could not approve the sale. On Tuesday, Michael personally told Maldonado that Denholm was not authorized to sell the truck, and that petitioner would lose money if it sold the vehicle for $750, but that he would sell the truck for another $150 which amount Maldonado refused to pay, stating that he had a

valid contract. About October 15, 1978, petitioner sold the truck for $1100. Michael had phoned the lot on October 7, but was not informed of the sale. In the past other salemen have signed as manager on buyer's orders (Resp. Exs. 5 and 6; R. 41). Other than instructions to his salesmen, Michael stated that he had taken no action to inform the public as to who could obligate Michael Motors, Inc. on a contract. Denholm had worked for Michael Motors, Inc. for two and one-half years (R. 30-55). Denholm testified that he had been in the automobile business as a salesman or manager some twenty-two years and stated that he had told Maldonado that the deal had to be approved by Mr. Michael (R. 55-67). Upon recall, Maldonado stated that when he first saw the truck it was parked in front of petitioner's lot and had a stock tape on it, but nothing marked it as a "Not for Sale" vehicle. Denholm put dealer's tags on the truck and Maldonado and his wife drove the truck around the block (R. 68, 69). Denholm did not tell him that the sale had to be approved by anyone else. Denholm said that he could get the truck on Tuesday (R. 68).

After hearing the evidence, the board found, on March 22, 1979, that Michael Motors, Inc. violated C.R.S. 1973, 12-6-118(3)(f) by intentional failure to perform a written agreement and suspended petitioner's used motor vehicle dealer's license from April 2, 1979 through April 18, 1979. Petitioner then filed an action in the District Court, Second Judicial District, State of Colorado, for judicial review of the board's final action pursuant to C.R.S. 1973, 24-4-106(4) which pertinently provides that "any party adversely affected or aggrieved by any agency action may commence an action for judicial review in the district court . . . ." Upon judicial review, the district court affirmed the board's action (Appendix C to petitioner's petition). Petitioner appealed and the Colorado Supreme Court acted on the appeal in view of the constitutional issues raised by petitioner. The court affirmed the judgment of the district court (Appendix A to petitioner's petition).

SUMMARY OF ARGUMENT

This case falls within the long established rule of this court that the constitutionality of state legislation will not be considered by the court unless in the case presented its consideration is imperatively required. Such is not the fact here as the evidence of record reveals that Mr. Denholm, if not having actual authority, did have apparent authority and petitioner corporation cannot escape liability as it held out Denholm to the public as its agent and clothed this agent with authority to speak for petitioner corporation. The evidence of record supports the findings of the board. Petitioner corporation is liable for the acts of its agent under the doctrine of apparent authority and, under the facts, is estopped to deny the authority of its agent.

Therefore, this court should follow its established rule of declining to anticipate a question of constitutional law. Rather, the case should be decided on the facts establishing apparent authority without reaching constitutional problems.

Should the court deem it necessary to reach the constitutional issue it is submitted that petitioner has not been denied its right of access to the courts. Petitioner has had full access to the courts of the State of Colorado and apparently did not even choose to avail itself of a remedy provided in C.R.S. 1973, 24-4-106(8). The cases cited by petitioner are either distinguishable or support the position of respondent. Contrary to the assertion of petitioner, there is not an absolute freedom of contract and a contract reasonably calculated to injuriously affect public interests may be regulated. The sale of motor vehicles is a matter of public interest and regulation by the legislature under the police power is proper. The legislation regulating automobile dealers was enacted to carry out a public purpose, is limited in its application, and affects all persons similarly situated. The statute in issue does not come within the fourteenth amendment. Accordingly, the writ of certiorari should be denied.

ARGUMENT

I.

IT IS NOT NECESSARY FOR THE COURT TO DECIDE THE CONSTITUTIONAL ISSUE AS PETITIONER, AS PRINCIPAL, IS LIABLE ON THE AGREEMENT MADE IN ITS BEHALF BY ITS AGENT WHO, IF NOT HAVING ACTUAL AUTHORITY, HAD APPARENT AUTHORITY.

The evidence establishes that the written agreement in issue was entered into between Denholm, as agent for petitioner, and Maldonado, the buyer. A principal is liable to third parties on a contract entered into on the principal's behalf by an agent having apparent authority. In *White v. Brock*, 41 Colo. App. 156, 584 P.2d 1224 (1978), the court stated that a ". . . principal who entrusts an agent with the management of a business is subject to liability to third persons with whom the agent enters into transactions usual in such business, although contrary to the directions of the principal, unless the third person has notice of such directions," citing *Restatement (Second) of Agency* section 161, Comment d. Similarly, in *Bowser v. Union Co.*, 112 Colo. 373, 149 P.2d 800 (1944), the court, citing from 2C.J. 574 section 214 and 2C.J. 592 section 229, stated that "the liability of the principle is determined. . . . not merely by what was the apparent authority of the agent, but by what authority the third person, exercising reasonable care and prudence, was justified in believing that the principal had by his acts under the circumstances conferred upon his agent." The court, in *Zambruk v. Perlmutter*, 32 Colo. App. 276, 510 P.2d 472 (1973), citing *Bowser, supra*, stated that "it is incumbent upon the principal, who seeks to escape liability for the agent's actions, to show that the third party had knowledge, or was charged with notice, that the agent was acting beyond the scope of his authority." The cases clearly reveal that a principal is bound by the acts of its agent when it places the agent in such a position that persons of ordinary prudence, reasonably conversant with business usages and customs, are led to believe and assume that the agent has certain

authority and one may deal with the agent in reliance on such assumption. *Johnson v. Hurley*, 115 Mo. 513, 22 S.W. 492 (1893), *Trail v. Ind. Com'n., Div. of Employment Security*, 540 S.W.2d 179 (Mo. App. 1976), *Wynn v. McMahon Ford Co.*, 414 S.W.2d 330 (Mo. App. 1967), *Galemore Motor Co. Inc. v. State Farm Auto Ins. Co.*, 513 S.W.2d 161 (Mo. App. 1974).

The record reveals that Maldonado believed Denholm to have the authority to act and bind petitioner. The board as a trier of facts found that Denholm did have such authority. *Barnes v. Treece*, 15 Wash. App. 437, 549 P.2d 1152 (1976). In fact, only a few months prior to the instant transaction, Mr. Denholm entered into similar agreements, as agent for petitioner, in selling cars to other customers. In *Portland Motor Sales Co. v. Millett*, 124 Me. 329, 128 A. 694 (1925), the court held that "plaintiff is bound by the acts of its agent, who, it admits, had general authority to sell . . . . though subject to approval of its officers." Likewise, in *Jones v. C.I.T. Co.*, 64 Utah 151, 228 P. 896 (1924), the court held that a finance company, retaining legal title to automobiles, which it permitted a sales company to exhibit and sell under representations that it had title was estopped, after bankruptcy of dealer, to deny his authority to sell and assert a right to a car adversely to one who had made an initial payment and was entitled to delivery on payment of the balance. The court stated "To hold otherwise . . . would . . . open the door to fraud and sharp practice." The same is true in the instant case. No doubt, one reason the legislature enacted C.R.S. 1973, 12-6-118(3)(f) was to protect the public from sharp practices of car dealers. In the case of *Russell v. First American Mortgage Co.*, 39 Colo. App. 360, 565 P.2d 972 (1977), the court stated that "a principal who by his words or conduct has caused another reasonably to believe that the principal has authorized his agent to take that action is liable under the doctrine of apparent authority . . . ."

It is submitted that Mr. Denholm at the very least had apparent authority to act and in doing so did bind petitioner to the agreement. *Meek v. Smith*, 59 Colo. 461, 149 P. 627

(1915). Petitioner's refusal to carry out the agreement violated C.R.S. 12-6-118(3)(f). As to whether the failure was "intentional," it is significant that this is not a specific intent offense. At most, the word simply means that petitioner, acting through its employee and/or agent, purposely and knowingly, as distinguished from accidentally, refused to perform the written agreement. "To do something intentionally is to do it purposely, and not accidentally." *State v. Marshall*, 15 Ohio App. 2d 187, 239 N.E.2d 755 (1968). "Intentionally" means only "that defendant meant to do what he did. . ." *Carey v. Greyhound Lines Inc.*, 380 F. Supp. 467 (D.C. La. 1973), modified on other grounds 500 F.2d 1372 (5th Cir. 1974). In *Clark v. American Marine Corp.*, 304 F. Supp. 603 (D.C. La. 1969), the word was held to mean knowingly and voluntarily not accidentally. Similarly, in *Kober v. Westinghouse Electric Corp.*, 480 F.2d 240 (10th Cir. 1973), the word meant deliberately and not accidentally. Mr. Michael purposely refused to carry out the agreement and his acts were "intentional" within the meaning of the statute. Petitioner asserts that it was justified in failing to honor the agreement as its president believed the agreement was not legal. Similar contentions have been made by creditors in cases involving violations of the Truth in Lending Act, 15 U.S.C.A. 1601, *et seq.*, and rejected by federal courts. *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161 (7th Cir. 1974), *McGowan v. King, Inc.*, 569 F.2d 845 (5th Cir. 1978). In *Haynes*, the court stated "That defendant mistook the law does not make its action any less intentional."

The findings of the board, affirmed by the trial court, are supported by substantial evidence. Mr. Denholm had apparent, if not actual, authority. In considering whether actual authority existed, evidence before the board revealed that Denholm and other employees had signed agreements in behalf of petitioner on prior occasions. Further, the buyer's order, resp. ex. 1, disclosed that Duane Michael notarized the odometer mileage statement on October 7, 1978 yet Mr. Michael stated that he was not present that day. Furthermore, even though the buyer's order had a place for a manager's signature, Mr. Michael stated that petitioner had

not had a manager for ten years. The weight to be given these facts were for the board's determination. Certainly, it cannot be said that the findings are not supported by substantial evidence as Mr. Denholm had apparent, if not actual authority, and this corporation cannot escape its obligation pursuant to the agreement.

Since the agreement was a binding contract, the constitutional issue need not be decided. Accordingly, the petition for writ of certiorari should be denied.

II.

PETITIONER HAS NOT BEEN DENIED ACCESS TO THE COURTS CONTRARY TO THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

As the record shows, the courts of the State of Colorado have been available and, in fact, used by petitioner to fully litigate the issues.

Petitioner's assertion that it was denied access to the courts is not correct. In fact, petitioner apparently chose not to exhaust a remedy available under C.R.S. 1973, 24-4-106(8) by not attempting to enjoin the board from conducting the March 14, 1979 hearing on the grounds that the board was proceeding beyond its constitutional jurisdiction. Hypothetical situations presented by petitioner which might possibly affect other motor vehicle dealers, discussed by petitioner on page 11 of its petition, are not before the court and should not be anticipated as suggested. The case of *Silver v. Cormier*, 529 F.2d 161 (10th Cir. 1976), cited by petitioner, involved a federal civil rights action and is distinguishable.

Petitioner is of the erroneous opinion that contract rights are absolute. Clearly, a used motor vehicle dealer, licensed and regulated pursuant to legislation enacted by the legislature under its police powers, cannot contract, or in this instance, evade its contractual obligations, to the detri-

ment of the citizens of the state. In *Nebbia v. New York*, 291 U.S. 502, 78 L. Ed. 940, 54 S. Ct. 505 (1934) this court, at pages 538, 539, stated:

> The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people.

In *Nebbia*, at page 523, this court also stated:

> Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest.

Numerous decisions of this court hold, as in *Nebbia, supra*, that there is no such thing as an absolute freedom of contract. The government may forbid or regulate a contract reasonably calculated to injuriously affect the public interests. *Atlantic Coast Line v. Riverside Mills*, 219 U.S. 186, 55 L. Ed. 167, 31 S. Ct. 164 (1911), *Chicago Burlington & Quincy R.R. Co. v. McGuire*, 219 U.S. 549, 55 L. Ed. 328, 31 S. Ct. 259 (1911), *Mugler v. Kansas*, 123 U.S. 623, 31 L. Ed. 205, 8 S. Ct. 273 (1887).

In *New Motor Vehicle Board of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 58 L. Ed. 2d 361, 99 S. Ct. 403 (1978), this court, citing *Nebbia, supra*, stated:

> Moreover . . . "certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned . . . statutes presenting the terms upon which those conducting certain

businesses may contract, or imposing terms if they do not enter into agreements, are within the state's competency."

Without question, the sale of motor vehicles is a matter of public interest and regulation by the legislature is proper under the police power. *Ford Motor Co. v. Pace*, 206 Tenn. 559, 335 S.W.2d 360, *appeal dismissed*, 364 U.S 444, 939 (1960), *Nelsen v. Tilley*, 137 Neb. 327, 289 N.W. 388 (1939), *Semke v. State of Oklahoma Motor Vehicle Comm.*, 465 P.2d 441 (1970), *Beathune v. Colorado Dealer Licensing Board*, ___ Colo. ___, 601 P.2d 1386 (1979), *Trail Ridge Ford v. Dealer Board*, 190 Colo. 82, 543 P.2d 1245 (1975). Certainly, the fourteenth amendment to the Constitution was not designed to interfere with the exercise of the police power by a state for the protection of health, the prevention of fraud, and the preservation of the public morals. *Powell v. Pennsylvania*, 127 U.S. 678, 32 L. Ed. 256, 8 S. Ct. 995 (1888). Clearly, the above cited cases reveal that a used motor vehicle dealer, as petitioner, is subject to regulation under the police powers and state restrictions upon contracts or agreements to prevent injury upon the public or to prevent fraud are not prohibited by the fourteenth amendment. The statute in question was so designed and enacted. The gist of the offense is not even the validity of the contract, even though the facts in this case reveal a valid contract, but the acts of petitioner in refusing to fulfill the written promise to the buyer. The statute includes "written agreements" and is not solely related to legally enforceable contracts. Specifically, the statute pertains to promises reduced to writing. To hold otherwise would permit a dealer to make promises in a written document, known only to the dealer to be unenforceable, and then at the dealer's option accept or reject the sale. This would only encourage sharp practices on the part of unethical dealers and instill a lack of confidence in the purchasing consumer.

Even the cases cited by petitioner fail to support its contention that due process and equal protection have been denied. Rather, the cases of *Barbier v. Connolly*, 113 U.S. 27,

28 L. Ed. 923, 5 S. Ct. 357 (1885) and *Truax v. Corrigan*, 257 U.S. 312, 66 L. Ed. 254, 42 S. Ct. 124 (1921) hold, contrary to petitioner's contention, that class legislation carrying out a public purpose, which treats those under similar circumstances to the same duties and liabilities, is not prohibited. Specifically, in *Hayes v. Missouri*, 120 U.S. 68, 30 L. Ed. 578, 7 S. Ct. 350 (1887), Mr. Justice Field, who also authored the court's decision in *Barbier*, stated:

> As we said in *Barbier v. Connolly*, speaking of the Fourteenth Amendment: "Class legislation, discriminating against some and favoring others is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

Likewise, the above quotation from *Barbier* was set forth by the court in *Truax v. Corrigan*, *supra*. In *Truax*, the court at 337 also stated that:

> In adjusting legislation to the need of the people of a State, the legislature has a wide discretion and it may be fully conceded that perfect uniformity of treatment of all persons is neither practical nor desirable, that classification of persons is constantly necessary, and that questions of proper classification are not free from difficulty . . . . Classification must be reasonable.

There is no evasion of the rule of equality when all within the class, such as car dealers, are subjected to the same duties and liabilities under similar circumstances. *Missouri Pacific Railway Co. v. Humes*, 115 U.S. 512, 29 L. Ed. 463, 6 S. Ct. 110 (1885), citing *Barbier v. Connolly*, *supra*, and *Soon Hing v. Crowley*, 113 U.S. 703, 28 L. Ed. 1145, 5 S. Ct. 730 (1865).

The cases cited above support the board's position that the challenged statue does not violate either the due process or equal protection clauses.

CONCLUSION

The petition for writ of certiorari should be denied as there is no federal question. The record reveals that the agent for petitioner had apparent, if not actual, authority to enter into the contract and did so yet petitioner refused to honor same. The supreme court of the state rightfully affirmed the trial court's action upholding the finding of the dealer board.

Petitioner's request for a writ of certiorari is based on an erroneous conclusion that a used motor vehicle dealer licensee has an absolute freedom to contract even against public interests. Even if it were necessary to decide the asserted constitutional issue, petitioner has totally failed to overcome the well recognized presumption of the constitutionality of the statute. Petitioner has not been denied access to the courts and in fact failed to exhaust all state remedies available. Certainly, the action taken against petitioner by the dealer board does not come within the fourteenth amendment as a denial of due process or equal protection. Therefore, the petition for a writ of certiorari should be denied for it is apparent from the evidence of record and the decisions of this court that issuance of the writ could result only in the affirmance of the judgment of the Supreme Court of Colorado.

WHEREFORE, respondent requests the court to enter an order denying the petition for writ of certiorari.

RESPECTFULLY SUBMITTED

J.D. MacFARLANE
Attorney General

RICHARD F. HENNESSEY
Deputy Attorney General

MARY J. MULLARKEY
Solicitor General

BILLY SHUMAN, 4878
Special Assistant Attorney General
General Legal Services Section

Attorneys for Respondent

1525 Sherman Street, 3d Floor
Denver, Colorado 80203
Telephone: (303) 866-3611
AG Alpha No. RU DF FBADB
AG File No. CLS/80949/1MT